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Mary E. Lathers

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DO YOU ABANDON ALL CONSTITUTIONAL PROTECTIONS BY ACCEPTING EMPLOYMENT WITH THE GOVERNMENT? : MANDATORY DRUG TESTING OF GOVERNMENT EMPLOYEES VIOLATES THE FOURTH AMENDMENT

I. INTRODUCTION

The United States appears to be overcome by a national feeling of hysteria over the use of illegal drugs in our society.¹ President Reagan characterized this feeling best in a live nationwide broadcast on September 14, 1986 when he stated that drugs are menacing our society, threatening our values, and killing our children.²

This concern over drug abuse has culminated in a national crusade against drugs with the federal government leading the way.³ President Reagan has moved the nation's drug fight into the heart of the American labor force by signing Executive Order 12564⁴ on September 15, 1986. This Order, advocating a drug-free federal workplace, followed passage by the House of Representatives of an anti-drug bill⁵ which would employ American military personnel to protect United States borders against drug smuggling, stiffens penalties against drug dealers, and relaxes a prohibition against courtroom use of evidence seized without a valid warrant.⁶

Under the Order, all federal employees in sensitive positions,⁷

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1. See, e.g., Staff, *Federal Workers Sue Over Drug Tests*; *S.J. Employees Oppose Reagan Plan*, S.J. Mercury News, Sept. 17, 1986, at 6A, col. 4. Describing the current climate on Capital Hill, Rep. Charles E. Schumer, D-NY, stated: "It's a mania." *Id.* at 6A, col. 5. *Is This Another Fad Crisis?*, L.A. Daily Journal, Sept. 18, 1986, at 4, col. 1 ("The issue of the moment is drug abuse. . . . People are suddenly paying a great deal of attention to (it). . . . Now, no other issue is as often cited as problem No. 1.").

2. Address to the Nation by President Reagan, *reprinted in* 22 WEEKLY COMP. PRES. DOC. 1183, 1184 (Sept. 14, 1986).

3. *Id.* at 1184. Reagan noted that his administration has made strides to curb this horror. Thirty-seven federal agencies are working toward this effort, and by 1987, spending for drug law enforcement will have tripled since 1981. He also noted that there have been increased seizures of illegal drugs and shortages of marijuana. *Id.*

4. Drug Free Federal Workplace, 3 C.F.R. 224 (1987), *reprinted in* 5 U.S.C.A. § 7301 (West Supp. 1987) [hereinafter Order].

5. H.R. 5484, 99th Cong., 2d Sess., 2 CONG. REC. 28, 460-61 (1986).

6. *Id.*

7. See *infra* notes 19-23 and accompanying text.

those with access to classified information and those whose work affects public health or safety, are required to submit a urine sample for analysis at the request of an agency head, regardless of whether they have given any indication of drug use.⁸ Not surprisingly, the mandatory drug testing Order has proven to be the most controversial element of President Reagan's anti-drug plan.

The Order has received wide media attention,⁹ sparked heated comments from the legal community and federal employees' unions,¹⁰ and served as the impetus for several law suits.¹¹ Advocates of the Order see testing as a means of assuring a safe work environment.¹² Opponents view drug testing as an invasion of privacy and a violation of fourth amendment protections against illegal searches.¹³ Recent court rulings support the later view, that Reagan's mandatory drug-testing program for federal workers is

8. See *infra* notes 24-26 and accompanying text.

9. See, e.g., Rust, *Drug Testing: The Legal Dilemma*, A.B.A. J., Nov. 1, 1986, at 51; *The Assault on Drugs*, L.A. Daily Journal, Sept. 18, 1986, at 4, col. 1; Holub, *ACLU Says Rulings Favor Its View Against Drug Testing*, S.J. Mercury News, Sept. 17, 1986, at 6A, col. 1; Staff, *Federal Workers Sue Over Drug Tests; S.J. Employees Oppose Reagan Plan*, S.J. Mercury News, Sept. 17, 1986, at 6A, col. 4; Sandler, *Reagan Announces Details of Plan to Combat Drugs*, L.A. Daily Journal, Sept. 16, 1986, at 6, col. 1; Hess, *Reagan's Anti-Drug Plan Calls for Mandatory Tests*, S.J. Mercury News, Sept. 16, 1986, at 1A, col. 5; Hess, *Reagans Ask U.S. to Shun Drugs*, S.J. Mercury News, Sept. 15, 1986, at 1A, col. 5.

10. See, e.g., Hess, *supra* note 9, at 8A, col. 2 (quoting Robert Tobias, President of the National Treasury Employees Union, who called the plan "a punitive dragnet designed to ferret out users and abusers in a sector where there is no evidence of a drug problem.") (also quoting Alan Adler, lawyer for the American Civil Liberties Union (ACLU), who called the proposal "a blatant violation of the rights of American workers to be free of search and seizure without probable cause."); Staff, *supra* note 9, at 6A, col. 4 (quoting Tobias, "No innocent federal worker should be subjected to this demeaning urine test.") (also quoting Rep. Charles E. Schumer, D-NY, "People will get unfairly branded as drug users and that's not American." *Id.* at 6A, col. 5); Holub, *supra* note 9, at 6A, col. 1 (Dorothy Ehrlich, Executive Director of the ACLU of Northern California noted that Reagan's plan violates the fourth amendment's guarantee of freedom from unreasonable search and seizure.).

11. See, e.g., *Valid Civil Liberties Concerns*, L.A. Daily J. Sept. 18, 1986, at 4, col. 1 ("It didn't take long for federal employees to move against the president's executive order on drug testing. Within twenty-four hours, the National Treasury Employees Union filed suit in U.S. district court. . . ."); see also *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986), *rev'd*, 816 F.2d 170 (5th Cir. 1987); *National Fed'n of Gov't Employees v. Weinberger*, 640 F. Supp. 642 (D.C. Cir. 1986), *rev'd and remanded*, 818 F.2d 935 (D.C. Cir. 1987) (probable jurisdiction noted); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986).

12. See, e.g., Rust, *supra* note 9, at 51 ("Employers respond that drug tests work — both to identify drug users and to reduce the incidence of on-the-job accidents."); Lacayo, *Putting Them All to the Test*, TIME, Oct. 21, 1985, at 61 ("Supporters of testing in general argue that it is justified by pressing requirements of public health and safety.").

13. See, e.g., Holub, *supra* note 9, at 6A, col. 1 (ACLU claims Reagan's plan violates the fourth amendment's guarantee against unreasonable search and seizures); Hess, *supra* note 9, at 8A, col. 2.

unconstitutional.¹⁴

This Comment discusses the fourth amendment implications of mandatory urine testing as authorized by Executive Order 12564. After addressing the provisions of the Order, explaining the fundamentals of urinalysis and the basis for considering it to be a search, this Comment proposes that if mandatory urinalysis is to be justified at all, it must be as an administrative search. The Comment then considers the standard for determining the constitutionality of administrative searches and applies this standard to mandatory drug testing of federal employees. The Comment concludes that random urine tests are reasonable under the fourth amendment only in extremely compelling circumstances.

II. Background

A. Executive Order 12564

Executive Order 12564 declares that "[d]rug use is having serious adverse effects upon a significant proportion of the national workforce. . . ."¹⁵ It also maintains that drug users are less productive, absent more often, detrimental to department efficiency, and pose a serious health and safety threat to the public.¹⁶

To combat this apparent drug problem, the Order states that "[t]he Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand. . . ."¹⁷

This program, formulated to aid drug users, subjects at least 1 million of the 2.8 million civilian¹⁸ federal employees in sensitive po-

14. See, e.g., *American Fed'n of Gov't Employees*, 651 F. Supp. at 726 (concluding that in light of the fourth amendment, plaintiffs were entitled to injunctive relief against periodic drug testing of civilian employees occupying "critical" positions with department of Army); *Lovvorn v. City of Chattanooga, Tenn.*, 647 F. Supp. 875 (E.D. Tenn. 1986) (urinalysis of all fire fighters for the presence of drugs violated the fourth amendment because a "reasonable suspicion" on which testing could be based did not exist); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1987) (court held mass urine testing of fire and police department employees violated the fourth amendment because there was no individualized basis or even general job related basis for instituting mass urinalysis); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (drug testing of school bus attendant violated the fourth amendment because there was no probable cause and the city had no particularized reason to believe plaintiff was a drug user).

15. Order, *supra* note 4, at 224.

16. Order, *supra* note 4, at 225.

17. Order, *supra* note 4, at 225.

18. Order, *supra* note 4, at 229, § 7(e). For the purposes of the Order, employee means all persons appointed in the Civil Service, but excludes those appointed in the armed services.

sitions to random drug testing at an initial cost of \$56 million.¹⁹

Controversy has arisen over many aspects of this program. The first such controversy is the use of the term "sensitive" to determine whether an employee in such a position will be subjected to drug tests.²⁰ The Order defines "employee in a sensitive position" as one who an agency head designates as sensitive, has been or may be granted access to classified information, is serving under a Presidential appointment, is involved in law enforcement, or whose work affects public health or safety or other functions requiring a high degree of trust and confidence.²¹ This definition is vague and includes broad categories of positions,²² making it extremely difficult to calculate how many people the Order could affect.²³

More importantly, the Order allows indiscriminate random testing of workers where there is no reason to suspect drug use.²⁴ Under the Order, an agency head is given the discretion to decide who must submit to a drug test and how often.²⁵ An employee need not be involved in an accident or unsafe practice or be suspected of drug use before that employee may be tested for drugs. Any appropriate evidence is sufficient to determine whether an employee uses illegal drugs.²⁶

In addition, the Order does not articulate any specific procedure or method to be followed when testing for drugs, but only specifies that agency testing procedures must conform to the Secretary of

Id.

19. Sandler, *supra* note 9, at 6, col. 2 (Reagan stated that \$500 million will go to enforcement, \$56 million to test federal employees, \$100 million to promote drug-free schools and \$100 million for state treatment facilities.).

20. See, e.g., Hess, *supra* note 9, at 8A, col. 1 (leaders of federal employee unions and the ACLU challenged the Administration to define "sensitive jobs.").

21. Order, *supra* note 4, at 229, § 7(d).

22. Order, *supra* note 4, at 229, § 7(d) (such as those positions mandating a high degree of trust and confidence).

23. See, e.g., Sandler, *supra* note 9, at 6, col. 4. "White House officials refused to speculate on how many of the 2.8 million federal workers could be affected. The Office of Personnel Management said the number with access to classified information alone surpasses the 1 million mark." *Id.*

24. See, e.g., Hess, *supra* note 9, at 8A, col. 2 (quoting Tobias who said this is a punitive dragnet and there is no evidence of a drug problem in the federal sector).

25. See Order, *supra* note 4, at 226, § 3(a). "The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency. . . ." *Id.*

26. Order, *supra* note 4, at 227, § 5(f). "The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program." *Id.*

Health and Human Services' guidelines once promulgated.²⁷ The Order does, however, state that absent suspected substitution or alteration of samples, procedures for providing urine specimens must allow individual privacy.²⁸ It also provides for retesting of those workers who initially test positive.²⁹

Finally, while the results of the tests must remain confidential and cannot be used in criminal proceedings,³⁰ there are two major consequences of testing positive. First, those found to be using drugs are required to obtain counseling through an Employee Assistance Program³¹ and may be removed from their duties pending treatment.³² Second, workers who are found to use illegal drugs will be fired if they refuse treatment or do not refrain from future drug use.³³

B. *Detecting Employee Drug Use Through Urinalysis*

There are three basic methods of biochemical urinalysis used to detect marijuana use.³⁴ The most common method is the Enzyme

27. Order, *supra* note 4, at 227, § 4(d).

28. Order, *supra* note 4, at 226-27, § 4(c). "Procedures for providing urine samples must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided." *Id.*

29. Order, *supra* note 4, at 227, § 5(e). "Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample. . . ." *Id.* The Order does not mention whether a more accurate testing method is required when retesting.

30. Order, *supra* note 4, at 228, § 5(h).

31. Order, *supra* note 4, at 227, §§ 5(a), 7(f). An Employee Assistance Program is an agency-based counseling program "that offers assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health problems that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment." *Id.*

32. Order, *supra* note 4, at 227, § 5(c):

Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

Id.

33. Order, *supra* note 4, at 227, § 5(d).

34. See, e.g., Comment, *Admissibility of Biochemical Urinalysis Testing Results For the Purpose of Detecting Marijuana Use*, 20 WAKE FOREST L. REV. 391 (1984). The three basic methods include: (1) the enzyme multiplied immunoassay test (EMIT); (2) the gas chromatography test (GC); and (3) the mass spectrometer test (MS) *Id.* at 391.

Multiplied Immunoassay Technique (EMIT).³⁵

The EMIT test is designed to detect the presence of tetrahydrocannabinol (THC) metabolites³⁶ after inhalation or ingestion of marijuana.³⁷ Although the test is a choice method for large-scale drug testing because it is inexpensive³⁸ and easily administered by untrained personnel,³⁹ it has been criticized as being inaccurate and misleading.⁴⁰

There are several inherent defects in the EMIT test and in its administration which render its accuracy questionable in determining drug intoxication. First, the EMIT test is only useful in determining recent marijuana use, not in measuring present intoxication.⁴¹ Urinalysis detects the presence of THC metabolites (which remain in the body long after the "high" or intoxicating state has dissipated), but not the intoxicating element of marijuana, THC.⁴² Thus, it is impossible to determine whether a person is intoxicated at

35. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 48 (1985). The EMIT is the test most widely used. *Id.* at 48. The other methods are less frequently used because they are far more expensive to administer. For example, the GC test costs between \$100-\$200 per specimen, whereas the EMIT test costs between \$15-\$20 per specimen. In addition, the EMIT test is easily administered on the job, while the other tests are more complex and must be conducted in a laboratory where an expert is available to perform the test and read the results. *See* Rust, *supra* note 9, at 51-52.

36. Comment, *supra* note 34, at 391.

37. Comment, *supra* note 34, at 391.

38. *See, e.g.*, Rust, *supra* note 9, at 51 (tests cost \$15-\$25 each and necessary equipment costs about \$5000).

39. Rust, *supra* note 9, at 51. Antibodies specific for certain drugs are added to vials of urine, causing the contents to change color when those drugs are present, much like a home pregnancy test. *See also* Comment, *supra* note 34, at 392-93. The EMIT test is found in an inexpensive field kit that can be used outside of the laboratory environment. *Id.*

40. *See* Susser, *supra* note 35, at 48. *See generally* Wykoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985) (examining state and federal court treatment of the reliability problem of EMIT urinalysis).

41. *See* Comment, *supra* note 34, at 397. Because urinalysis tests are designed to detect THC metabolites, they cannot determine levels of intoxication. The THC metabolite is not the intoxicating ingredient in marijuana but is a by-product of the intoxicating ingredient, THC. Unlike THC, the THC metabolite remains in the body for an extended period of time. Since urinalysis detects only the presence of the THC metabolite, it cannot determine whether an individual is intoxicated at the time the test is administered. *Id.* *See also* Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?*, 19 LOY. L.A.L. REV. 1451, 1457 n.40 (1986). Urine tests do not measure intoxication at the time of testing, but instead determine whether the person tested "recently" used the drug. *Id.* at 1457 n.40.

42. Comment, *supra* note 34, at 397. *See also* Uelmen, *Employee Drug Tests on Collision Course with Privacy*, L.A. Herald Examiner, Mar. 23, 1986, Comment, at F-1, col. 5 (Marijuana can be detected as long as 30 days after use); Dackis, *Persistence of Urinary Marijuana Levels After Supervised Abstinence*, 139 AM. J. PSYCH. 1196 (1982).

the time of testing.⁴³

Second, there is the danger that one might falsely test positive for drug use without ever having used the drug.⁴⁴ One way to falsely produce a positive result is by passive inhalation of marijuana smoke.⁴⁵ Another way that a false positive occurs is through "cross-reactivity," where a substance ingested is misidentified as an illegal substance.⁴⁶ Substances which are said to create false positives through cross-reactivity include: aspirin,⁴⁷ herbal tea,⁴⁸ and therapeutic cold medicines such as Contac, Nyquil and Sudafed.⁴⁹ Moreover, a false positive may occur when naturally-produced substances in the body, such as enzymes, are detected and falsely identified as drugs.⁵⁰

Finally, improper handling, instrument malfunction, and human error also play a role in the EMIT test's inaccuracy. As a result of inexperienced personnel implementing and handling the test in the work setting, there is an even greater chance for error than is already present when tests are administered by technical personnel in a controlled setting.⁵¹ Furthermore, chain of custody issues may also arise, such as whether the specimen actually belonged to the accused or whether it was tainted by other specimens.⁵²

Noting this tremendous potential for error and finding single, unconfirmed EMIT tests unreliable, several courts⁵³ and the execu-

43. See Rust, *supra* note 9, at 52. Because urinalysis indicates only that a drug has been used in the recent past and it does not show whether the employee has used drugs on the job, civil libertarians have rallied against inquiries into off-duty drug use, which they claim is an invasion of privacy. *Id.*

44. See, e.g., Parham, *Drug Testing Focus of Legal Challenge by Nuclear-Plant Workers*, L.A. Daily Journal, June 18, 1986, at 5, col. 1 (Centers for Disease Control found 4% "false positive" ratio in the EMIT test); Lacayo, *supra* note 12, at 61 (Critics note that the EMIT test is far less reliable than the 97%-99% accuracy which the manufacturer claims).

45. See, e.g., Zeidenberg, *Marijuana Intoxication by Passive Inhalation: Documentation by Detection of Urinary Metabolites*, 134 AM. J. PSYCH. 76 (1977).

46. Zeese, *Marijuana Urinalysis Tests*, 1 DRUG L. REP. 25, 26 (1983).

47. *Id.*

48. Stein, *S.F. Votes to Ban Random Drug Tests in Workplace*, L.A. Times, Nov. 19, 1985, pt. I, at 18, col. 3.

49. Rust, *supra* note 9, at 51.

50. Zeese, *supra* note 46, at 28.

51. See, e.g., Harris, *Military's Faulty Drug-Testing Program Wrongly Punished Thousands*, L.A. Times, Sept. 16, 1984, pt. I, at 3, col. 1; Morgan, *Problems of Mass Urine Screening for Misused Drugs*, Journal of Psychoactive Drugs, Oct.-Dec., 1984, vol. 16, at 4.

52. See, e.g., Wykoff, 613 F. Supp. 1504 (N.D. Ind. 1985).

53. *Id.* See also Higgs v. Wilson, 616 F. Supp. 226 (W.D. Ky. 1985) (Court sustained preliminary injunction against imposing sanctions on prisoners based on one unconfirmed test); Kane v. Fair, 33 Cr.L. 2492 (Mass. Superior Ct., Aug. 5, 1983); Johnson v. Walton, No. 561-84 (Rutland Superior Ct., Vermont, Feb. 14, 1985) (EMIT test alone was not scientifically

tive branch, through Executive Order 12564 have recognized the need to confirm a positive EMIT test with a more reliable alternative method of analysis. The manufacturer of the EMIT test⁵⁴ itself recommends that a urine test be followed with a confirmation test to establish positive use of a drug.⁵⁵

Discounting the numerous criticisms of the accuracy of urinalysis by the EMIT test, and assuming it is a valid indicator of drug use, President Reagan's mandatory drug tests by urinalysis must still survive the constitutional challenge to be considered valid.

C. Fourth Amendment Requirements

The fourth amendment⁵⁶ protects against unreasonable searches and seizures⁵⁷ of the person and those things in which a person has a reasonable expectation of privacy.⁵⁸ Consequently, extending fourth amendment protection to federal employees subjected to drug tests requires an initial determination that these urinalysis tests are "searches" within the meaning of this amendment.

reliable).

54. See Rust, *supra* note 9, at 51 (SYVA Laboratories of Palo Alto, California).

55. *Id.* The Gas Chromatography (GC) and Mass Spectrometer (MS) tests are used most frequently for confirmation because of their higher degree of accuracy. GC and MS tests reduce the drug's constituent chemicals to their molecular level and identify the "fingerprint" of a specific drug. *Id.*

56. The fourth amendment states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

U.S. CONST. amend. IV.

57. A "search" connotes an exploratory investigation, invasion, or a prying into a hidden place for what is concealed. A "seizure" implies a forcible dispossession of the owner, not a voluntary surrender. *Bielicki v. Superior Court of Los Angeles County*, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962).

58. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The extension of fourth amendment protection against unreasonable searches and seizures of those things in which one has a reasonable expectation of privacy was fleshed out in *Katz*. Before *Katz*, the traditional approach to what was protected under the fourth amendment focused on intrusion into constitutionally protected "areas." *Katz* rejected this approach and instead, shifted fourth amendment emphasis from the constitutional protection of "areas" to the protection of "privacy." *Katz* stated "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.

1. *Is Urinalysis a Search?*

To constitute a search, one's reasonable expectation of privacy to be free from governmental intrusion must be invaded.⁵⁹ To determine whether one's reasonable expectation of privacy has been invaded, one must first have exhibited an actual (subjective) expectation of privacy, and, second, that expectation must be one that society is prepared to recognize as reasonable.⁶⁰

Cases have established that there is no reasonable expectation of privacy in what one has knowingly subjected to public exposure.⁶¹ Thus, courts have held voice samples⁶² and writing samples⁶³ not to be searches because of the expected public exposure they involve, while they have held the taking of blood samples,⁶⁴ pubic hair samples,⁶⁵ fingernail scrapings,⁶⁶ and X-rays⁶⁷ to constitute searches.

Applying the *Katz v. United States*⁶⁸ reasonable expectation of privacy test to urinalysis, most courts find it indistinguishable from the blood test held to be a search in *Schmerber v. California*.⁶⁹ One

59. See generally *Katz*, 389 U.S. 347 (1967).

60. *Id.* at 361. Applying these requirements to the situation in *Katz*, the Court concluded that *Katz's* reasonable expectation of privacy was violated and therefore a search had taken place. *Id.* at 353. *Katz* involved the bugging of a public phone booth from which *Katz*, a bookie, conducted his business. *Id.* at 348. The Court determined that *Katz* had an actual and reasonable expectation of privacy that his phone conversation would be kept private when he placed his call in a phone booth and closed the door behind him. *Id.* at 361. By entering the phone booth, *Katz* sought to exclude the uninvited ear and the government invaded this interest by bugging his conversation. *Id.* at 352. Therefore, the government action constituted a search. *Id.* at 353.

61. *Id.* at 351. The Court stated that the fourth amendment provides no protection for what a person knowingly exposes to the public, but does protect what a person seeks to preserve as private. *Id.*

62. *United States v. Dionisio*, 410 U.S. 1 (1973).

63. *United States v. Mara*, 410 U.S. 19 (1973).

64. *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the defendant was arrested for drunken driving, and a blood sample was extracted from him over his objection by a physician acting pursuant to police orders. *Id.* at 758-59. Relying on language in the fourth amendment that individuals have a right to be secure in their persons, the Court held the forced blood test to be a search within the fourth amendment. *Id.* at 767. The Court did, however, find the search reasonable due to the exigent circumstances involved. *Id.* at 770-71.

65. *Bouse v. Bussey*, 573 F.2d 548 (9th Cir. 1977).

66. *Cupp v. Murphy*, 412 U.S. 291 (1973).

67. *United States v. Allen*, 337 F. Supp. 1041 (E.D. Pa. 1972).

68. 389 U.S. 347 (1967).

69. 384 U.S. 757 (1966). See also *Storms v. Coughlin*, 600 F. Supp. 1214, 1218 (S.D. N.Y. 1984) (The Court stated "although [urinalysis] involves no forced penetration of body tissues, as does a blood test, it does involve the involuntary extraction of body fluids. In that sense, if not literally, it is an 'intrusion beyond the body's surface.'" (quoting *Schmerber*, 384 U.S. at 769-70).

such case is *Storms v. Coughlin*,⁷⁰ which involved a prison program of random testing for traces of narcotics and marijuana in the urine of prisoners. Noting that interests in human dignity forbid searches intruding beyond the body's surface and that being forced to perform a private bodily function into a bottle held by another is simply degrading,⁷¹ the court in *Storms* found urinalysis to be a search that violates one's reasonable expectation of privacy and therefore must be afforded the same protection given blood tests by *Schmerber*.⁷²

More recently, the court in *American Federation of Government Employees v. Weinberger*⁷³ stated that "[t]he taking of a urine sample most closely resembles the taking of a blood sample" which has been held to be a search by *Schmerber*. The reasons for this comparison were articulated best by the district court in *Capua v. City of Plainfield* when it stated:

Though urine, unlike blood, is routinely discharged from the body so that no actual intrusion is required for its collection, it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference.

Both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including, but not limited to recent ingestion of alcohol or drugs. . . . As with blood, each individual has a reasonable expectation of privacy in the personal 'information' bodily fluids contain. For these reasons, governmental taking of a urine specimen constitutes a search and seizure within the meaning of the Fourth Amendment.⁷⁴

Apart from likening urinalysis to a blood test, courts which have focused solely on urinalysis, have applied the *Katz* reasonable expectation of privacy test and found a sufficient infringement of privacy for urinalysis to be considered a search. Applying the first prong of the *Katz* test, whether one has exhibited an actual (subjective) expectation of privacy, courts have found that "most people . . . have a certain degree of subjective expectation of privacy in the act of urination."⁷⁵ This expectation of privacy may differ depending upon the individual being tested. Some might not mind being com-

70. 600 F. Supp. 1214, 1218 (S.D. N.Y. 1984).

71. *Id.* (citing *Schmerber*, 384 U.S. at 769-70).

72. *Id.*

73. 651 F. Supp. 726, 733 (S.D. Ga. 1986).

74. 643 F. Supp. 1507, 1513 (D.N.J. 1986) (citations omitted) (*Capua* upheld a challenge to mass urine testing by city fire fighters and police department employees).

75. *Lovvorn*, 647 F. Supp. at 880.

pelled to urinate in front of another, while others might find forced urination extremely offensive.

Not only do most people expect privacy while urinating, they also expect that the contents of their urine will be kept private and will not be analyzed to determine the contents thereof.⁷⁶ Moreover, in the labor context, courts have noted that employees subjectively expect to be free from intrusive urine testing while on the job. Most employees are not warned prior to accepting employment that submission to compulsory urine testing might become a condition of continued employment.⁷⁷

Noting that one generally has a subjective expectation of privacy in the act of urination and the contents thereof, one must then determine whether that expectation of privacy is one that society recognizes as reasonable. In making this determination, one must first acknowledge that urination has traditionally been considered a private act. The excretion of body fluids and body wastes is one of the most personal and private functions a human performs.⁷⁸

Furthermore, this act has historically been conducted in private. As a result, bathrooms at home and in public places accommodate this privacy interest by providing a private room or stall in which to urinate. Indeed, society has generally condemned urination in public. This ban on public urination is evidenced by the enactment of many municipal ordinances making urination in public unlawful.⁷⁹ For these reasons, it is apparent that the expectation of privacy involved in the act and contents of urination is one that society is prepared to recognize as reasonable.

Finally, without laboring through the *Katz* analysis, contemporary cases concede that taking a person's urine and testing it for drugs is a search.⁸⁰ Early on this principle was demonstrated by the court in *Allen v. City of Marietta*, which felt "constrained by current law to hold that urinalysis is a search. . . ."⁸¹ More recently, the court in *American Federation of Government Employees* stated "[i]f

76. *Capua*, 643 F. Supp. at 1513.

77. *Id.* at 1515. The court concluded that because no provisions for mass urine testing were included in the collective bargaining agreement signed by the fire fighters and the city and that a policy statement authorizing the city to conduct such tests was never communicated to the fire fighters, the fire fighters reasonably expected to be free from government urine testing on the job. *Id.*

78. *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 588-89 (N.D. Ohio 1987).

79. *See Capua*, 643 F. Supp. at 1514.

80. *See, e.g., McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Feliciano*, 661 F. Supp. at 584; *Capua*, 643 F. Supp. at 1513; *Louvorn*, 647 F. Supp. at 879.

81. 601 F. Supp. 482, 488 (N.D. Ga. 1985).

at one time it might have been possible to argue that urinalysis does not constitute a search or seizure, such an argument is now entirely untenable."⁸²

2. *Is the Search Reasonable?*

Noting that urine tests are considered searches by modern courts, one must next question whether the search was reasonable and therefore not violative of the fourth amendment.

a. *Erosion of Warrant and Probable Cause Requirements*

The fourth amendment does not prohibit governmental searches under all circumstances, but sets forth a standard under which a reasonable search may be conducted and requires that a neutral and detached magistrate issue a warrant authorizing that search.⁸³ Ordinarily, the standard is that there must be "probable cause" to believe that a violation of the law has occurred before the individual involved may be subject to a search by the government.⁸⁴ After such cause is shown, a warrant may be issued.

Recognizing the need for a warrant, the Supreme Court has held that warrantless searches "are per se unreasonable under the fourth amendment-subject only to a few specifically established and well-delineated exceptions."⁸⁵ These exceptions to the warrant requirement generally involve exigent circumstances where the evidence is likely to disappear or be destroyed while a warrant is being obtained⁸⁶ or where there is immediate danger to the community or

82. 651 F. Supp. at 732.

83. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The magistrate's neutrality increases the likelihood that a correct decision as to the existence of probable cause will be reached before a search is made, and that unconstitutional searches will be kept to a minimum. *Id.* at 467.

84. *See New Jersey v. T.L.O.*, 469 U.S. 325, 358 (1985) (Brennan, J., dissenting in part). There is probable cause to search "where 'the facts and circumstances within the officials' knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that a criminal offense had occurred. . . ." (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). *Id.* at 358.

85. *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (N.D. Ga. 1985) (quoting *Coolidge*, 403 U.S. at 454-55).

86. *See, e.g., Schmerber*, 384 U.S. at 770. Schmerber's conviction was upheld because the arresting officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). *Id. See also Cupp*, 412 U.S. 291 (1973). The Court held that traces of blood and skin under the defendant's nails would likely disappear, therefore a limited warrantless search was justi-

police officers.⁸⁷ Hence, when there is probable cause to conduct a search and "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,"⁸⁸ a warrant sometimes need not be obtained.

A series of cases involving searches of government employees has surfaced among the exceptions to the warrant requirement.⁸⁹ In addition, these exceptions have not demanded a level of suspicion based on probable cause as an absolute requirement to a reasonable warrantless search.⁹⁰ Rather, to determine the level of suspicion needed to justify a search in these cases, the courts have applied a test which balances the invasion which the search entails against the government's need to search.⁹¹

The Supreme Court case which fleshed out this balancing test was *Camara v. Municipal Court*.⁹² In *Camara*, the Supreme Court held that a warrant was required to conduct a routine housing inspection for safety violations.⁹³ The Court then proceeded to determine what level of cause was required for a reasonable search. In making this determination, the Court noted that the government had a strong need to search in order to maintain public health and safety. It also stressed that the inspections were not conducted as part of a

fied to preserve the evidence. *Id.*

87. See, e.g., *Michigan v. Tyler*, 436 U.S. 499 (1978) (firemen may enter burning building without a warrant to control fire).

88. *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967).

89. See, e.g., *Allen*, 601 F. Supp. 482 (N.D. Ga. 1985) (Warrantless search of City employee's urine for the presence of drugs); *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966) (Warrantless search of Custom's employee's jacket); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975), *cert. denied*, 423 U.S. 989 (1975) (Warrantless search of Postal employee's locker for stolen mail).

90. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *T.L.O.*, 469 U.S. at 340 ("The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.'").

91. *Terry*, 392 U.S. 1 (1968). The Court used the *Camara* balancing test to determine the level of cause needed to conduct a "stop and frisk" search. See also *Storms*, 600 F. Supp. at 1220 (discussing *Bell v. Wolfish*, 441 U.S. 520 (1979)). The Court in *Bell* questioned whether visual body-cavity inspections in a jail could ever be conducted on less than probable cause. Balancing the significant security interests of the institution against the privacy interests of the inmates, the *Bell* Court concluded they could. The *Storms* Court followed suit and held that prison officials could test urine without probable cause. *Id.*

92. 387 U.S. 523, 538-39 (1967).

93. *Id.* at 540. While a warrant was required, it was not the traditional warrant usually required in criminal proceedings. Instead, an administrative warrant was required. *Id.* at 538. Subsequent cases have dispensed with the warrant requirement in exceptional circumstances, but have still utilized the *Camara* balancing test to determine the level of suspicion required for a reasonable search.

criminal proceeding, but as part of an administrative investigation seeking to remedy safety violations.⁹⁴ Because only administrative sanctions were involved, the Court felt that the invasion involved was minimal. Therefore, by balancing the government's need to search against the invasion involved,⁹⁵ the Court concluded that a standard less than that required by the traditional probable cause test was necessary for the inspector to validly conduct the type of administrative search involved in *Camara*.⁹⁶

Recent cases involving searches for administrative purposes, such as *Capua*⁹⁷ and *Feliciano v. City of Cleveland*,⁹⁸ have applied the *Camara* balancing test and determined that a lesser standard of suspicion is necessary to conduct a reasonable warrantless search. In *Capua*, city fire fighters challenged a department procedure which subjected them to unannounced urine tests. In striking down the plan as unreasonable, the court stated that "[t]he Fourth Amendment allows defendants to demand urine of an employee only on the basis of a reasonable suspicion predicated upon specific facts and reasonable inferences drawn from those facts in light of experience."⁹⁹ Clarifying this standard, the court stated that "[t]he reasonable suspicion standard requires individualized suspicion, specifically directed to the person who is targeted for the search."¹⁰⁰ Applying this standard, the court concluded that because the city lacked any specific suspicion as to the individual fire fighter's drug use, the search was unreasonable.¹⁰¹

The *Capua* approach was also followed in *Feliciano*.¹⁰² In *Feliciano*, Cleveland police academy cadets challenged a departmental plan requiring academy cadets to submit to surprise mass urine tests. The court applied the *Camara* balancing test and held that the fourth amendment allows police officials to demand a urine specimen for chemical analysis without a warrant only if a "reasonable individualized suspicion that a police officer is using illicit drugs. . . ." can be demonstrated.¹⁰³ The court concluded that a tip intimating that current members of the police academy were known to use

94. *Id.* at 538.

95. *Id.*

96. *Id.* at 537.

97. 643 F. Supp. 1507 (D.N.J. 1986).

98. 661 F. Supp. 578 (N.D. Ohio 1987).

99. *Capua*, 643 F. Supp. at 1517.

100. *Id.*

101. *Id.*

102. 661 F. Supp. 578 (N.D. Ohio 1987).

103. *Id.* at 589.

drugs was insufficient to make the taking of urine samples constitutionally reasonable because there was no reasonable suspicion of drug use directed at any particular member of the class.¹⁰⁴ The reasonable suspicion standard therefore was not met because no individualized suspicion was shown.

The reasonable suspicion standard was also applied in *New Jersey v. T.L.O.*¹⁰⁵ In *T.L.O.*, a school official's warrantless search of a student's purse for cigarettes, after that student had been found smoking in violation of a school rule, was challenged as an unreasonable search and seizure.¹⁰⁶ After striking the *Camara* balance between the school children's privacy interest and the school's need to maintain a learning environment,¹⁰⁷ the Court concluded that a search of a student should depend, under all the circumstances, on the reasonableness of the search.¹⁰⁸

In determining the reasonableness of a search, the Court applied the two-pronged test articulated in *Terry v. Ohio*.¹⁰⁹ "[F]irst, one must consider 'whether the . . . action was justified at its inception,' . . . second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"¹¹⁰ Under the *Terry* test, a search is "'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."¹¹¹

Similarly, *Lovvorn v. City of Chattanooga, Tenn.*¹¹² recently adhered to the *T.L.O.* reasoning that a search must be justified at its inception.¹¹³ Like *Capua*, *Lovvorn* involved a city's plan to urine test its fire fighters for the presence of drugs. In determining what level of suspicion was required to conduct this type of search, the court found that "[w]hile probable cause would not be required for the City to conduct urine tests, the balancing of the interests of the

104. *Id.* at 580.

105. 469 U.S. 325 (1985).

106. *Id.* at 329.

107. *Id.* at 337.

108. *Id.* at 341. The Court stated that the school setting requires some modification of the level of suspicion of illicit activity needed to justify a search and that probable cause was not an irreducible requirement of a valid search. *Id.*

109. 392 U.S. 1 (1968) (*Terry* used the *Camara* balancing test to determine the level of suspicion needed to conduct police "stop and frisks.").

110. *T.L.O.*, 469 U.S. at 341.

111. *Id.* at 342.

112. 647 F. Supp. 875 (E.D. Tenn. 1986).

113. *Id.* at 882.

[C]ity and the individual requires some quantum of individualized suspicion before the tests can be carried out. This quantum may be denoted as 'reasonable suspicion.'"¹¹⁴

The *Louvorn* court found that the reasonable suspicion-justified at its inception requirement had not been satisfied. Prior to imposing urinalysis, the city failed to demonstrate that any specific fireman's job performance, physical condition or mental capacity was impaired. Therefore, there were no reasonable grounds to suspect that any fire fighter would test positive for illegal drugs.¹¹⁵

Most recently, the court in *Policemen's Benevolent Association of New Jersey v. Township of Washington*¹¹⁶ complied with the standard articulated in *T.L.O.* by stating that a search under the fourth amendment must be "justified at its inception," and "reasonably related in scope to the circumstances which justified the interference in the first place."¹¹⁷ It also encompassed the *Capua-Feliciano* reasonable suspicion standard by finding that a search of a municipal employee may be conducted "upon reasonable suspicion based on objective facts and all reasonable inferences drawn therefrom."¹¹⁸ In *Township of Washington*, the Township's proposed warrantless drug testing plan of municipal employees was challenged as an unreasonable search and seizure.¹¹⁹ Applying the justified at its inception-reasonable suspicion requirement, the court found the Township's reliance on statistics depicting a nation-wide drug problem insufficient to support the testing of local police officers. The court concluded there was no assertion in the statistics that any particular member of the Washington Township police force had been involved in illegal drug use.¹²⁰

One may glean from the aforementioned cases that when a warrantless search is conducted for administrative purposes and not as part of a criminal proceeding, the government must demonstrate a reasonable, individualized suspicion that a violation of the law has occurred before the government search will be found reasonable. There are, however, some circumstances under which a blanket warrantless search may be conducted without some measure of individu-

114. *Id.* at 880.

115. *Id.*

116. 672 F. Supp. 779 (D.N.J. 1987).

117. *Id.* at 790.

118. *Id.* at 791.

119. *Id.*

120. *Id.*

alized suspicion.¹²¹ This exception is known as the administrative search. If mandatory urinalysis is found to be a warrantless search not based on a reasonable, individualized suspicion, it must be considered as an administrative search in order to be found reasonable.

b. *The Administrative Search*

An administrative search usually involves some form of area inspection and is based on knowledge of conditions in the area as a whole.¹²² *Camara*¹²³ is the seminal case defining the parameters of a reasonable administrative search.

In *Camara*, the Court required an administrative warrant¹²⁴ to justify routine housing inspections within a specific area, but did not require "specific knowledge of the condition of the particular dwelling"¹²⁵ to enter any residence. The Court, in finding the administrative search reasonable by balancing the need to search against the invasion involved, weighed heavily the government's interest in public health and safety, realized that safety violations are not always visible from the outside, and recognized that the object of the search was not to gather evidence of criminal activity.¹²⁶

Blanket searches requiring no individualized suspicion, but only area-wide generalized suspicion, have since been found reasonable in other areas. In *United States v. Montoya de Hernandez*,¹²⁷ the Court concluded that Congress has plenary power to authorize warrantless searches at the United States border without a showing of probable cause. Similarly, in *United States v. Skipwith*,¹²⁸ blanket searches for weapons and explosives in airport departure areas were found reasonable. Finally, warrantless searches of briefcases and purses upon entering federal courthouses were also found to pass constitutional muster in *Downing v. Kunzig*.¹²⁹

121. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). To have a constitutional search, individualized suspicion is usually a prerequisite. "But the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* at 561.

122. *Camara v. Municipal Court*, 387 U.S. 523, 536 (1967).

123. *Id.* See also *supra* notes 91-96 and accompanying text.

124. *Id.* at 538. Probable cause to issue an administrative warrant exists if "reasonable legislative or administrative inspection standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.*

125. *Id.*

126. *Id.*

127. 473 U.S. 531, 537 (1985). See also *Martinez-Fuerte*, 428 U.S. at 545.

128. 482 F.2d 1272 (5th Cir. 1973). See also *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973), *cert. denied*, 414 U.S. 840 (1973).

129. 454 F.2d 1230 (6th Cir. 1972).

On the other hand, warrantless searches for the purpose of discovering drugs and alcohol on patrons attending rock concerts have not been found constitutionally reasonable administrative searches under the fourth amendment.¹³⁰ The determination of whether an administrative search is considered reasonable has been made by the courts by applying the *Camara* balancing test once again.¹³¹

In summary, cases have established that the *Camara* balancing test, which balances the need to search against the invasion involved, is used in two different contexts to determine whether warrantless searches are reasonable. In the first instance, the balancing test is used to formulate the level of suspicion required to conduct a reasonable warrantless search. Using this test, cases have established that a reasonable suspicion is required to conduct a reasonable warrantless search. In the second situation, if the reasonable suspicion standard has not been met, the courts use the *Camara* balancing test to determine whether a valid administrative search, which requires no individualized or particularized suspicion, has been conducted.

Therefore, to determine whether President Reagan's plan is constitutional, one must first examine whether warrantless random urine tests are reasonable. This necessarily entails a discussion of what standard of suspicion is required to conduct reasonable warrantless searches. Secondly, if warrantless urine tests fail to meet the standard of suspicion required by such cases as *Capua*, *Feliciano*, *T.L.O.* and *Township of Washington*, one must then determine whether urinalysis is justified as an administrative search.

III. FOURTH AMENDMENT ANALYSIS

Noting that urine tests are intrusions into areas where individuals have a reasonable expectation of privacy and thus constitute searches, the question then becomes whether the intrusions authorized by the Order are unreasonable and therefore violate the fourth amendment.

A. *Is the Warrantless Search Reasonable?*

1. *Level of Suspicion Needed to Justify a Search*

To determine the level of suspicion needed to conduct a reasonable warrantless search, courts apply the *Camara* balancing test

130. *Gaioni v. Folmar*, 460 F. Supp. 10 (M.D. Ala. 1978); *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977).

131. *Camara*, 387 U.S. at 534-35.

which balances the invasion which the search entails against the government's need to search.¹³² Because urine tests are investigative in nature, rather than conducted for criminal prosecution purposes,¹³³ the balancing test advocated in *Camara* is the most appropriate test to measure the level of suspicion required for a reasonable search. The *Camara* balancing test allows for a more flexible standard of suspicion in urinalysis cases than the traditional probable cause standard required in criminal proceedings.

a. *The Camara Balancing Test*

i. *The Need to Search*

President Reagan asserts in Executive Order 12564 that drug use is having serious adverse effects upon the federal workforce.¹³⁴ Similar to *Camara*, President Reagan also asserts potential health and safety threats to the public as justifications for the government's need to search by conducting drug tests.¹³⁵

ii. *The Invasion Involved*

Like the administrative search conducted in *Camara*, urine testing under the Order is not conducted as part of a criminal proceeding. Rather, the results of urine tests may be used to terminate employment or force employees to seek counseling.¹³⁶ Under the *Camara* reasoning then, because only administrative sanctions are involved, the intrusion suffered is minimal. Thus by balancing the need to search against the invasion involved, one can reason that the level of suspicion required for a reasonable warrantless search may be less than the probable cause standard commonly used in criminal investigations. But unlike *Camara*, the sanctions threatened by the Order, i.e. loss of a job, are more severe than the consequences resulting from a housing inspection. In addition, the method of search mandated by the Order, i.e. urine testing, is more intrusive than the housing inspection involved in *Camara*. Therefore, a standard greater than that afforded routine housing inspections is warranted. Such a standard was applied in *Capua*,¹³⁷ *Feliciano*,¹³⁸

132. *Id.*

133. See *supra* notes 25-33 and accompanying text.

134. See Order, *supra* note 4, at 224.

135. See Order, *supra* note 4, at 225.

136. See *supra* notes 30-33 and accompanying text.

137. 643 F. Supp. 1507 (D.N.J. 1986).

138. 661 F. Supp. 578 (N.D. Ohio 1987).

*T.L.O.*¹³⁹ and *Township of Washington*.¹⁴⁰

b. *The Reasonable, Individualized Suspicion Standard*

i. *Capua v. City of Plainfield-Feliciano v. City of Cleveland*

In order to conduct a reasonable warrantless search under the standard set forth in *Capua* and *Feliciano*, a reasonable suspicion, based on specific objective facts that the particular employee is then under the influence of drugs must be shown.¹⁴¹

Under the *Capua-Feliciano* reasonable suspicion standard, an agency head seeking to conduct a warrantless search under the Order would be required to show specific objective facts implicating the specific individual to be tested. The urinalysis proposed in President Reagan's Order, however, fails to meet this standard. It would allow indiscriminate random testing of all federal workers in sensitive positions, regardless of whether they have acted suspiciously.¹⁴² This "dragnet" drug testing at the whim of agency heads ignores the dictates of the fourth amendment by not requiring any individualized suspicion. Dragnet testing, by definition, tests masses of people; it does not single out specific individuals to be tested based on their behavior.

ii. *New Jersey v. T.L.O.-Policemen's Benevolent Association of New Jersey v. Township of Washington*

Under the standard set forth in *T.L.O.* and *Township of Washington*, a search must depend on the reasonableness, under all the circumstances, of the search.¹⁴³ To determine the reasonableness of a search, one must first consider whether the action was justified at its inception, and second, whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.¹⁴⁴ A search is justified at its inception when there are reasonable grounds for suspecting that the search will uncover evidence of a violation of the law.¹⁴⁵

The search at issue in the Order appears to squarely fail this criterion of being justified at its inception. Because federal employees

139. 469 U.S. 325 (1985).

140. 672 F. Supp. 779 (D.N.J. 1987).

141. See *supra* notes 97-104 and accompanying text.

142. See *supra* notes 24-26 and accompanying text.

143. *T.L.O.*, 469 U.S. at 341. See *supra* note 105-08 and accompanying text.

144. See *supra* notes 109-10 and accompanying text.

145. *T.L.O.*, 469 U.S. at 342.

in sensitive positions may be tested for drugs regardless of whether they have given any indication of drug use, there is no reason to suspect that the search would turn up evidence of employee drug use. By dragnet drug testing a large amount of people, the government is taking a stab in the dark, hoping to find a drug user among those tested. This sort of practice falls far short of the standard mandated in *Capua*, *Feliciano*, *T.L.O.*, and *Township of Washington*, which requires a reasonable suspicion directed at the person to be searched. If the reasonable suspicion standard articulated in *Capua-Feliciano* and *T.L.O.-Township of Washington* did not require specific articulated facts that the employee to be searched then be under the influence of drugs, there would be no limit on a public official's power to search.¹⁴⁶ He could search anyone, anywhere, whenever a serious crime is threatened.

Because President Reagan's Order does not satisfy the reasonable suspicion standard, the only way blanket warrantless urinalysis may be conducted without some measure of individualized suspicion is as an administrative search.

2. *Urinalysis as an Administrative Search*

The test for determining whether a warrantless administrative search is reasonable and therefore not violative of the fourth amendment requires balancing "the need to search" against the "invasion which the search entails."¹⁴⁷ Thus, to determine whether the federal government may subject an employee to a warrantless urinalysis test, one must balance the government's interest in searching with the employee's privacy interests in avoiding the search.¹⁴⁸

a. *The Need to Search*

The need to search entails examining the government's purpose for enacting the Executive Order. The government asserts as its first

146. *Lovvorn*, 647 F. Supp. at 882. See also *United States v. Davis*, in which the court held that *Terry* did not justify wholesale frisking of airline passengers. 482 F.2d 893, 907 (9th Cir. 1973).

147. *Camara*, 387 U.S. at 534-35.

148. See *Jones*, 628 F. Supp. at 1508 (Balanced bus attendant's reasonable expectation of privacy from a search by mandatory urine testing for drugs against public safety considerations); *Allen*, 601 F. Supp. 482 (N.D. Ga. 1985) (court balanced the individual's expectation of privacy against the government's right as an employer to urine test); *Bell*, 441 U.S. at 559 (In approving body cavity searches of prisoners, Court stated that the test of reasonableness requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails.").

interest that "[f]ederal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs. . . ." ¹⁴⁹

A second justification stated for implementing the Order is that the use of illegal drugs by federal employees "impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs . . . to perform their jobs effectively." ¹⁵⁰

Finally, the third reason advocated for conducting random urine tests is that "[t]he use of illegal drugs . . . by federal employees also can pose a serious health and safety threat to members of the public. . . ." ¹⁵¹

To determine whether the interests asserted by the government in the Executive Order are important enough to outweigh the invasion of the search, one must examine the justifications held sufficient in other administrative searches found to be reasonable. In cases involving border searches, ¹⁵² the courts recognized the government's very important interest in protecting the border from drug trafficking, illegal alien entrance, contraband smuggling, international espionage, and other security threats. ¹⁵³ In the airport context, the courts have emphasized the tremendous potential for mass violence that could take place in an airplane bombing or high-jacking and the need to intervene before such action occurs in upholding the searches as reasonable. ¹⁵⁴ Similarly, bombings, terrorism, and hostage situations in courthouses around the country were considered such public safety threats, that searches at courthouse doors were found to be reasonable. ¹⁵⁵ Finally, some random urine searches of federal employees who worked around high voltage wires, ¹⁵⁶ and of city mass transit drivers ¹⁵⁷ have been upheld on the basis that the govern-

149. Order, *supra* note 4, at 225.

150. Order, *supra* note 4, at 225.

151. Order, *supra* note 4, at 225.

152. See *supra* note 127 and accompanying text.

153. See *supra* note 127 and accompanying text.

154. See *supra* note 128 and accompanying text.

155. See *supra* note 129 and accompanying text.

156. *Allen*, 601 F. Supp. 482 (N.D. Ga. 1985). Employees worked for the Electrical Division of the Board of Lights and Power. Since the nature of their work was hazardous, the employers felt that drug use posed a public safety problem. *Id.* at 484.

157. *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976). In *Division 241*, the court held that the safety of the riders outweighed the employee's interest in refusing to submit to a urine or blood test. *Id.* at 1267.

ment's paramount interest in protecting the public outweighed the employees' expectation of privacy.

In contrast, in the rock concert situation, the courts found that the searches were designed to seize drugs, not to combat public danger.¹⁵⁸ They noted that although the possession of drugs was sometimes illegal, it posed no danger to the public like a bomb or gun would.

Consequently, it appears that the government must show a serious threat to the public safety in order for its interest in searching to outweigh the individual's privacy interest. In examining the first two justifications asserted by the Executive Order, it is evident that they do rise to the level of combatting a public danger. Combatting absenteeism, lower productivity, inefficiency of federal departments, and ineffective job performance is not equivalent to preventing mass violence, terrorist attacks, or mass transit accidents. As a result, such justifications fail to outweigh the invasion which the search entails. Although the first two government interests asserted are not sufficiently compelling to outweigh an employee's privacy interest in not being searched, the third justification of ameliorating serious public health and safety threats would most certainly be considered compelling enough.

While preventing public danger may be a valid reason for the government to subject all federal employees in sensitive positions to mandatory urine tests, it can be argued that only those federal employees who are responsible for the public health and safety should be forced to submit to the warrantless urine tests. The government might have a substantial interest in testing those who are in a position to affect or jeopardize the lives of many, such as air traffic controllers or law enforcement officers, but it does not have an overwhelming interest in randomly testing those who only incidentally have access to classified information and therefore pose no threat to the public safety, such as an executive secretary. On the other hand, one might argue that even executive secretaries with access to classified information might pose a threat to the public if that information were revealed when blackmailed because of their drug use or if that information were sold to support their drug habits. This possibility would have to be recognized in the court's balancing process when examining the government's need to search.

Assuming the government's interest in protecting the public is deemed substantial, it must still outweigh the invasion involved to be

158. See *supra* note 130 and accompanying text.

considered reasonable.

b. *The Invasion Which the Search Entails*

One can hardly deny that the physical and emotional aspects of a mandatory urine test are extremely intrusive. Many courts find urinalysis analogous to the indignity suffered in a body cavity search,¹⁵⁹ while others find it more degrading than a blood test.¹⁶⁰ The court in *Storms* stated "[i]n a way in which having blood extracted could never be, being forced under threat of punishment to urinate into a bottle held by another is purely and simply degrading."¹⁶¹

Similarly, the Court in *Terry*¹⁶² concluded that even a brief frisk search is "an annoying, frightening, and perhaps humiliating experience."¹⁶³ If a brief frisk search is frightening, surely a procedure requiring people to partially disrobe and expose their genitals for inspection while urinating is an even more frightening and humiliating experience.¹⁶⁴

The court in *Feliciano* also recognized the intrusion involved when urine is analyzed, because analysis enables an employer to discover the personal physiological secrets each person's urine holds, such as if an employee is pregnant or on medication for a certain illness.¹⁶⁵

In addition to considering the scope of the intrusion, one must also consider the manner in which it is conducted and the place in which it is conducted. Since the Order has not yet articulated the specific procedure or method to be followed when testing for drugs, one can only speculate on how intrusive the procedure will be. However, one can glean from the fact that the Order must allow individual privacy when urinating except when substitution is suspected and the fact that substitution has become rampant, that observation will be required in almost all instances.

Finally, the effectiveness of the search must also be consid-

159. See, e.g., *Storms*, 600 F. Supp. at 1220; *Tucker v. Dickey*, 613 F. Supp. 1124, 1129-30 (W.D. Wis. 1985).

160. *Storms*, 600 F. Supp. at 1220.

161. *Id.* at 1218.

162. 392 U.S. 1 (1968).

163. *Id.* at 25.

164. Now that individuals are buying "pure urine" to pass drug tests and substituting it for their own impure urine, employers are requiring close observation of the urination process. See Freedburg, *Anti-drug Testing Business Booming*, S.J. Mercury News, Nov. 2, 1986, at 8A, col. 4.

165. *Feliciano*, 661 F. Supp. at 589.

ered.¹⁶⁶ In *Schmerber*,¹⁶⁷ the Court noted that a blood test was a reasonable way to analyze blood-alcohol levels, because "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol."¹⁶⁸ In contrast, in *Kuehn v. Renton School District*,¹⁶⁹ the court struck down a blanket search of students' luggage for smuggled contraband because a less onerous alternative of having parents search their child's suitcase was available.

Urinalysis by the EMIT test is not a highly effective means of determining drug use. It has been criticized as being inaccurate and misleading by many sources.¹⁷⁰ It also has the potential for falsely labeling those who have never used drugs as drug users.¹⁷¹ Because of the extended duration of THC metabolites in the urine after drug use, the EMIT test cannot determine whether an employee is under the influence of drugs at the time of testing.¹⁷² For this reason it is not effective in determining present intoxication which is what is relevant to someone's on-the-job performance.

Finally, the government must take into account possible less intrusive alternatives. Why not implement procedures analogous to the sobriety tests used in alcohol intoxication cases? Presumably these methods are equally effective, yet much less intrusive. Considering the degree of intrusion involved in a urine test, any less onerous alternative available should be used.

IV. CONCLUSION

Executive Order 12564 seriously effects the privacy of at least one million federal employees who have been ordered to submit to warrantless urine tests. These dragnet drug tests are not justified under the fourth amendment reasonable suspicion standard because no reasonable suspicion that a particular employee is then under the influence of drugs is required. Consequently, the Executive Order should be found unconstitutional.

The only way blanket urinalysis of federal employees in sensi-

166. *Camara*, 387 U.S. at 537-38. The Court allowed housing inspections for safety violations based on the condition of an area as a whole because it was the only method that would achieve acceptable results. *Id.*

167. 384 U.S. 757 (1966).

168. *Id.* at 771.

169. 103 Wash. 2d 594, 600, 694 P.2d 1078, 1082 (1985).

170. See *supra* notes 40-55 and accompanying text.

171. See *supra* notes 40-55 and accompanying text.

172. See *supra* notes 40-55 and accompanying text.

tive positions can be justified, is as an administrative search. In determining whether urinalysis is a reasonable administrative search, courts must balance the need to search with the invasion involved, and must show that there are no less intrusive and effective alternatives available. In light of the questionable accuracy of the EMIT test in demonstrating drug use, and the substantial invasion which a urine test entails, mandatory warrantless urine tests of all federal employees in sensitive positions can only be justified in compelling circumstances.

Mary E. Lathers